MOSBERT BHD.

v.

CHATIB KARI & ANOTHER CASE

FEDERAL COURT, KUALA LUMPUR
SALLEH ABAS LP
WAN SULEIMAN FJ
HASHIM YEOP SANI FJ
[CIVIL APPEAL NO. 2 & 75 OF 1984]
8 OCTOBER 1984

LAND LAW: *Caveats - Extension - Application to remove - Interests of purchasers of undivided shares - Whether caveatable - Whether contractual or equitable - Purchasers from predecessors - Whether good against successors in title.*

The two appeals against the orders of extension of caveats were heard together.

One Amos William Dawe and one Lim Chong Ah, trading under a partnership named Sharikat Mosbert, decided to develop the 113 acres of land they owned in Johore Bahru into a housing estate to be known as "Taman Chendrakaseh". Subdivision of the land was proposed but before it was approved, the proposed subdivided lots were sold to members of the public. The respondents bought one lot of 6,000 sq. ft. each. This was in 1967. Later the land and the whole undertaking relating to Taman Chendrakaseh was transferred to a private limited company, called Mosbert Enterprise Sdn. Bhd. and subsequently it was transferred to the appellant company. The appellant company failed in its business and a winding up order was made in 1977. The Official Receiver was appointed as the liquidator and receiver for the company.

The land in question was sold to a private company, called Jet Age Construction Sdn. Bhd., which was to deal directly, at its own expense, with the purchasers of the proposed subdivided lots. Registration of the transfer into the name of Jet Age could not however be effected because the respondents lodged caveats in 1982, after the land was sold to Jet Age, which itself filed a caveat in 1983.

On receiving notice to remove their caveats, the respondents filed an originating summons asking, *inter alia,* for leave to commence a civil suit against the appellant and to extend their caveats. They obtained a consent order. The Official Receiver applied to have the consent order set aside and the originating summons dismissed. The Judge however allowed the application for leave to commence a civil suit and also made an order extending the respondents' caveats until final determination of the suits. The appellant company appealed against the extension of the caveats.

Held:

[1] The interests of the respondents in the land despite the smallness in terms of area were not merely contractual but also equitable in nature and therefore caveatable under s. 323 (1) of the National Land Code. A purchaser of land, even of a proposed subdivided lot, who has paid the purchase price, acquires an equitable interest in it until registered as the legal owner.

[2] Though the respondents had signed their purchase agreements with the original owners, the appellant company were bound, as they took the legal interest in the land specifically subject to the prior equitable interests of the respondents. Further, the appellant company were estopped from denying the respondents' interests by the legal relationship that arose

between them and the respondents on their acceptance from the respondents of the purchase price instalments. In addition, the respondents' rights were recognised by the Official Receiver himself. The fact that Jet Age had a bigger interest than the respondents in that it owned the whole land was irrelevant.

[3] The respondents' rights being earlier in time than those of Jet Age, they had better protection.

[Appeal dismissed.]

Legislation referred to:
National Land Code Act 56/1965, s. 323(1)

For the appellant - P. Suppiah; M/s. Suppiah & Singh
For the respondents - Julie Lim; M/s. H.H. Long & Co.

JUDGMENT

Salleh Abas LP:

These two appeals were heard together and the facts are as follows:

Two men named Amos William Dawe (hereinafter referred to as "Dawe") and Lim Chong Ah (hereinafter referred to as "Lim") were a partnership trading under the name of Sharikat Mosbert (hereinafter referred to as "the Sharikat").

Dawe and Lim owned a piece of land in the Mukim of Plentong in the District of Johore Bahru. It was held under Johore Grant No. 72 for Lot 83 and the total area was 113 acres 2 roods and 20 poles. Trading under the name of the Sharikat Dawe and Lim decided to develop the land into a housing estate to be known as "Taman Chendrakaseh". A lay-out plan for the subdivision of the land into several lots were prepared with a view to obtaining separate titles for them. Before the subdivision was approved by the authorities the proposed subdivided lots, numbering about 300 altogether were sold to members of the public. Chatib bin Kari and Farland @ Firlan bin Sirin, the two respondents in these two appeals, were amongst those who purchased the proposed subdivided lots. Chatib's lot is lot No. 86, whilst that of Farland's lot is lot No. 62. The area of each of these lots is 6,000 sq. ft.

Chatib purchased his lots for RM1,500 by an agreement dated 19 April 1967 which he entered into with Dawe and Lim. Chatib paid 10% as down-payment and the balance by monthly instalments of RM25 a month. By 27 March 1971 he completedly paid up the balance. Like Chatib, Farland too bought his lot by an agreement. But in his case the price was RM1,850 and the agreement was dated 13 April 1967. He paid 10% as down-payment and completed paying the balance by monthly instalments of RM30 a month.

Whilst Chatib and Farland were paying their monthly instalments, Dawe and Lim turned the Sharikat into a private limited liability company and called it Mosbert Enterprise Sdn. Bhd. (in this judgment referred to as "the Enterprise"). Dawe became the chairman of the Enterprise whilst Lim its managing director. With the formation of the Enterprise Dawe and Lim transferred the land and the whole undertaking relating to Taman Chendrakaseh to this company. Subsequently, Dawe and Lim formed a public company, called Mosbert Bhd., which is the appellant company in these two appeals. Dawe was its managing director and Lim its executive director. Once again the land in question and the Taman Chendrakaseh project changed ownership. Thus the appellant company became vested with the title to the land with responsibilities to develop it into the housing estate as envisaged by Dawe and Lim.

In the meantime whilst the purchasers of the proposed subdivided lots were waiting for their titles, the appellant company failed in its business. The result was that on 12 January 1977 Johore Bahru High Court issued a winding-up order and by another order dated 21 June 1977 the Court appointed the Official Receiver as the Liquidator and Receiver for the appellant company. During the course of the liquidation the Official Receiver sold the land in question to a private company called Jet Age Construction Sdn. Bhd. (in this judgment referred to as "Jet Age ") for a total sum of RM2,005,750. A sale and purchase agreement was signed on 1 April 1981 by the Official Receiver and Jet Age and on that date Jet Age paid 10% of the price and paid the balance on 29 March 1982, i.e. about a year later.

Both the Official Receiver and Jet Age were aware that there were a number of purchasers who bought the land on the basis of the proposed subdivided lots. The sale and purchase agreement between the Official Receiver and Jet Age made provisions (see Clause 3, 4 and 5) to the effect that Jet Age had at its own expense to deal direct with those purchasers with a view to removing the encumbrances and settling whatever rights or interests they might have in the land. It is also provided that if Jet Age was unable to settle these prior rights and interests within a year, Jet Age was entitled to exercise an option of either withdrawing from the purchase, in which case the Official Receiver must refund the 10% deposit which Jet Age paid on the signing of the agreement or proceeding with the purchase in which case Jet Age had to pay the balance to the Official Receiver and take the responsibilities of dealing direct with those encumbrances of prior rights and interests of people, like Chatib and Farland. Since Jet Age paid the balance almost exactly one year after the date of their sale and purchase agreement it is clear that Jet Age had chosen the second option, i.e. to buy the land with all its encumbrances.

Having fully paid for the land, Jet Age were given the issue document of title, but registration of the transfer into their name could not be effected because Chatib and Farland, presumably on becoming aware that the land was sold to Jet Age, lodged caveats on 29 September 1982 and 7 October 1982 respectively in order to protect their interests. Incidently Jet Age also filed their caveat on 26 March 1983.

Steps were taken to have the caveats by Chatib and Farland removed and so on 16 August 1983 Chatib and Farland received a notice requiring them to remove those caveats within one month of the date. As a result they filed on originating summons in the Johore Bahru High Court asking, *inter alia*, for leave to commence a civil suit against the appellant company as regards the proposed subdivided lots Nos. 83 and 62 and in addition thereto for an order that their caveats be extended until the suit for which leave was applied for would be finally disposed of.

On 7 September 1983 both Chatib and Farland obtained a consent Court order for the extension of their respective caveats until the final disposal of the originating summons; Mr. Lee Yee kuang, the Senior Assistant Official Receiver who appeared on that date on behalf of the appellant company having agreed to the order. However, subsequently on 29 October 1983 the Official Receiver through his solicitor M/s. Suppiah and Singh filed a summons-in-chambers applying to set aside the consent order and to dismiss Chatib's and Farland's originating summons. On 29 November 1983, after a long hearing, Shankar J allowed Chatib's application for leave to commence a civil suit against the appellant company. The learned Judge also made an order extending Chatib's caveat until final determination of the suit. The suit (Civil Suit No. 684 of 1983) was filed on or about 27 December 1983. Farland who obtained a similar order from the learned Judge on 19 March 1984 filed his civil suit (Civil Suit No. 187 of 1984 on or about 14 March 1984.

The appellant company accepted the learned Judge's ruling on the granting of leave to commence civil suits but were dissatisfied with his ruling on the extension of the caveats. They thus appeal against that part of the learned Judge's decision.

Mr. Suppiah who appeared for the appellant company submitted to us that because the whole land was sold to Jet Age, Chatib's and Farland's caveats which relate only to 12,000 sq. ft. - a very small and insignificant area as compared to more than 113 acres which Jet Age purchased - should be removed as their interests are only contractual and therefore could be satisfied with damages. He then listed out a number of points to show that Jet Age's interests are more worthy of protection than those of Chatib and Farland.

It is, however, not necessary for us to deal with every one of those points, because most of them were irrelevant any way. In our view the nature of Chatib's and Farland's interests are of paramount importance in deciding these appeals. Are they merely contractual as submitted by Mr. Suppiah, or are they equitable, as having arisen from the respective sale and purchase agreements which they signed with Dawe and Lim? In our judgment there can be no doubt that their interests in the land despite the smallness in terms of area were not merely contractual but also equitable in nature and therefore caveatable under s. 323(1) of the National Land Code. The law which has been consistently followed by the Court in this country is that a purchaser of land who has paid the purchase price, until registered as the legal owner, acquires an equitable interest in it. It may well be that the proposed subdivided lots which they purchased did not have the legal status of being separate pieces of land until legally subdivided; nevertheless that fact does not prevent these purchasers from acquiring equitable interests to the extent of the area they had purchased. By ignoring the proposed subdivided lots as having had no existence, everyone of these purchasers was in law beneficially entitled to be registered as a co-proprietor to the extent of the area purchased, if they so wished. Indeed the sale and purchase agreements which Chatib and Farland signed were in fact going further. Clause 4 made a provision to the effect that upon paying the whole of the purchase price, Chatib and Farland or their nominees were entitled to be registered as owners if the separate new titles were issued by the Land Office. However, in the event that no such new titles were issued and purchase price having been fully paid up, Chatib and Farland were entitled to a deed of assignment and an irrevocable power of attorney to be executed in their favour entitling them to deal with their interests in the land as if they were the absolute owners.

It is also true that Chatib and Farland only signed their purchase agreements with the original owners, namely Dawe and Lim and that they were not parties to the two transfers of the legal title to the land, first to the Enterprise and then secondly to the appellant company. But this fact is not the reason to ignore, or to bring an end to, Chatib's and Farland's equitable interests, because the transferees i.e. the Enterprise and the appellants company, being successors in title took the legal interest in the land specifically subject to the prior equities. In the first place in the sale and purchase agreement between Chatib and Farland on the one hand and Dawe and Lim, the original owners, on the other, the parties agreed that these agreements bound their assigns and successors in title. The preamble and Clause 13 of the agreement refer to Dawe and Lim as "the Vendors" which term is defined to include:

> their personal representatives successors in title and assigns.

It thus becomes clear that by virtue of the preamble and Clause 13, the obligations contained in the agreement were not intended to last only at the level of the original parties to the agreement, but to enure to whoever are the legal owners of the land until the obligations

therein are performed. Failure on the part of Chatib and Farland to obtain deeds of assignment and irrevocable power of attorney when they had fully paid up the purchase price in 1971 does not affect the nature nor diminish or extinguish their interests at all. These are their rights and it is entirely up to them whether or not they wished to have these or either of these instruments executed in their favour. On the other hand what about the failure of the appellant company as successors in title to execute these documents? In our view, Chatib's and Farland's equitable interests in the land continue unaffected and their equities did not depend upon them.

In the second place, every transfer of legal title to the land from one owner to another beginning with Dawe and Lim to the Enterprise and from the latter to the appellant company was made with an express recognition of Chatib's and Farland's equitable interests and meticulous care was taken by the parties to preserve these interests. The sale and purchase agreement dated 24 September 1968 between the Enterprise and the appellant company, for example recited that the latter as the purchasers:

> have agreed to take over and assume responsibility for the liabilities of the vendors (the Enterprise) amounting to ... RM578,000 and for the transfer as set out in the third schedule hereto.

Clause 5 repeats this recital as follows:

> The purchasers (the appellant company) should take over and discharge all liabilities of the Vendors (the Enterprise) and transfer the subdivided lots as set out in the third schedule hereto and in respect of contracts with the customers or licensees not herein specifically referred to but relating solely to the sale of the subdivided lots of the properties referred to in the first schedule hereto.

It is therefore clear beyond doubt that this agreement was intended by the parties to benefit people like Chatib and Farland who had purchased the proposed sublots from Dawe and Lim.

Normally, Chatib and Farland, being strangers to this agreement cannot sue on this agreement although it is for their benefit unless they can show that equitably they were in fact brought into contractual relationship by subsequent conduct. It is not disputed that Chatib and Farland paid their purchase price instalments to the appellant company. At first the instalments were paid to Allen and Gledhill, the solicitors, who drafted the sale and purchase agreement, then to the "Sharikat", then to Mosbert Investment and Development Ltd., presumably one of the companies in the notorious Mosbert group, and finally in late 1969 and throughout 1970 and 1971 to the appellant company. The acceptance of these payments by the appellant company brought them into legal relationship which estops them from denying the Chatib's and Farland's interests. Not only that, even the Official Receiver himself who managed the appellant company also recognised these rights. (See Clause 3, 4 & 5 of the agreement between the appellant company and Jet Age on 1 April 1981).

Thus in our view the rights and interests which Chatib and Farland have in the land are beyond any challenge. That have been in existence long before Jet Age came up the scene to buy the land and bought over the rights and interests of the purchasers of the proposed subdivided lots. The fact that Jet Age's interest is bigger in that they purchased the whole land instead of a few small portions of it as did Chatib and Farland does not mean that they can ignore and get over these rights and interests. Mr. Suppiah's submission seems to us to be that priority should be given to Jet Age because their interest is bigger than Chatib's and Farland's. With respect, we cannot agree. Our law gives protection to all irrespective of size, be they big or small. What the law looks for is the nature of the rights and interests

which the parties seek to protect. In this case can the Official Receiver show us that Jet Age's interest is more worthy of protection than those of Chatib and Farland? Yet all that Mr. Suppiah could tell us is that Jet Age had spent a vast sum of money to purchase the land and that they need the land now in order to develop it. Surely Chatib and Farland could similarly say that they too had sacrificed a lot in order to raise money to pay for the land from their hard earned money. They need the land for building their own home. These are economic and commercial considerations which are not relevant for the determination of the present appeal.

Jet Age was not compelled by anyone to purchase this land. They knew that there are encumbrances on this land. They bought it subject to these encumbrances with an expectation that the owners of the encumbrances would release their rights and interests. Besides, their sale and purchase agreement was even weighted in their favour because Jet Age was allowed to withdraw from the deal if they so wished. Contrary to that option they chose to proceed with the purchase and paid the whole purchase price to the Official Receiver in the hope that the owners of the encumbrances would give in. Finding that they are unable to purchase the encumbrances, they came to Court using the Official Receiver's name requiring the Court to order the removal of the caveats lodged by the owners of the encumbrances.

Now both Chatib and Farland as owners of encumbrances as well as Jet Age acquired equitable rights in respect of the land by virtue of their separate sale and purchase agreements. Chatib's and Farland's rights being earlier in time have better protection than that of Jet Age which is later in time. We therefore see no merit in these appeals. We remain unpersuaded by the appellant's submission to interfere with the learned Judge's order to let Chatib's and Farland's caveats remain until final determination of the suits (C.S.684/83 and C.S. 187/84) which they brought against the appellant company. The appeals are therefore dismissed with costs and the deposits should be paid to the respondents on account of taxed costs.

Before we conclude this judgment we feel bound to make a few observations relating to certain matters revealed in these appeals. The learned Judge has already expressed his observations regarding the conduct of the firm of solicitors, M/s. Suppiah & Singh, who acted for both Jet Age, the purchaser, and the Official Receiver, the vendor. We wholeheartedly agreed with the observations and we say no more on this matter. But what we wish to express here is that we do not understand why the Official Receiver should bind the appellant company to appoint this firm of solicitors to act on the appellant company's behalf. This is spelt out in clause 6 of the agreement between the Official Receiver and Jet Age as follows:

> 6. The Vendor hereby appoints and instructs Messrs. Suppiah & Singh, solicitors for the Purchasers, as his agent for the purpose of taking such action as may be necessary in the name of the Vendor in connection with the said Land and in particular to do the following acts and things:
>
> (a) to negotiate and settle with all the individual purchasers of the said Land and other persons who had caveated the said Land and for this purpose take such Court proceedings as may be necessary, the cost of which is to be borne solely by the Purchasers;
>
> (b) to defend any action brought by any one against the Vendor in matters connected with and arising out of the said Land;
>
> (c) to deal with the State Government on all matters connected with the said Land;
>
> (d) to do such other act or thing as may be necessary for the purpose of completing the sale.

The Official Receiver should have foreseen the likelihood of conflict of interests between the appellant company as the vendor and Jet Age as the purchaser. The matter is more serious when M/s. Suppiah & Singh, the two gentlemen who are partners of the firm of solicitors concerned are also the shareholders of Jet Age.

Under the sale and purchase agreement the problem of getting rid of the encumbrances is the responsibility of Jet Age at whose expense these encumbrances had to be negotiated and settled. We do not see nor comprehend any logic why the Official Receiver should agree to lend the appellant company's name in this firm of solicitors who obviously acted on behalf of Jet Age to take up the proceedings to remove Chatib's and Farland's caveats through successive stages which finally reached us in the present appeals, especially when the appellant company, having received the full purchase price and done what was to be done under the agreement, i.e. giving issue document of title to Jet Age, has no more interests in the land. To show that the Official Receiver is indifferent to these appeals is that no official from this Department was present whilst the appeals were being argued before us. And to show that the present proceedings were in essence carried on at the instance of Jet Age and M/s. Suppiah & Singh is clearly demonstrated by the incident relating to the consent Judgment (*supra*) dated 7 September 1983. It is recalled that on that date Mr. Lee Yee Kuang, a Senior Assistant Official Receiver, who appeared on behalf of the Official Receiver - M/s. Suppiah and Singh being absent - agreed to Chatib's and Farland's application to have their caveats extended to a certain date. A consent order was therefore recorded. One would expect that this consent order should be honoured and accepted by the Official Receiver on whose behalf this officer had consented to. However, contrary to that expectation on 2 November 1983 M/s. Suppiah and Singh acting in the name of the Official Receiver filed a summons-in-chambers to set aside the consent order.

It is really sad that the Official Receiver should allow his name to be used in this way as what happened in this case tends to erode public confidence in the competence of his department. It may well be that he could not foresee this situation and the possibility of conflict of interests when he agreed to be bound by Clause 6 of the agreement quoted above. We hope that this is an exceptional case.

Also found at [1984] 2 CLJ 277